absolute terms that there can be no incorporation by reference in New York, and yet in view of the scarcity and questionable authority of the decisions upon which the rule rests,[30] it would still seem competent for the courts to recognize the doctrine of incorporation within the limits indicated.

THE PRIORITY OF A MORTGAGE TO SECURE FUTURE ADVANCES.—While it is well established that a mortgage to secure future advances is valid as between the parties[1] and is not in itself a fraud on creditors,[2] and further that the mortgagee prevails over subsequent incumbrancers for all loans actually made prior to the time at which their liens attached,[3] there is a sharp conflict of authority on the question of priority of such a mortgage over an incumbrance intervening between the date of the instrument and the time of the loan. Where the mortgagee is under a contract to make advances, the American courts generally allow him priority over intermediate lienors irrespective of whether or not he had notice of their rights.[4] If he had no notice, this result is manifestly correct in jurisdictions which regard a first mortgage as conveying the title, since in addition to his equitable right to hold the land as security he is also grantee of the legal title and therefore should not be bound by equities.[5] The same rule is applied, however, even where a mortgage is considered as a mere lien, because of the fiction that the lien attaches at the date of the mortgage and not at the time of the loan.[6] Except on that fiction, the application of the general American rule to cases where the mortgagee had notice of the intervening incumbrance, is hard to justify in either class of jurisdictions. Inasmuch as equity compels the mortgagee to hold the property as security for the debt, and no obligation arises in favor of the mortgagee until the money is actually advanced, there being no agreement on the mortgagor's part to accept loans, it would seem that the mortgagee's rights should be postponed to those of the intermediate incumbrancers. This result is reached by the English courts, which also properly permit the mortgagee to repudiate his contract to make

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[30]Matter of Reins (N. Y. 1908) 59 Misc. 126; Booth *v.* The Baptist Church *supra;* Matter of Emmons *supra;* Matter of Sanderson (N. Y. 1894; 9 Misc. 574, and cases cited in note 18.

[1]U. S. *v.* Hooe (1805) 3 Cranch 73; Commercial Bank *v.* Cunningham (Mass. 1837) 24 Pick. 270; Bell *v.* Fleming's Executors (1858) 12 N. J. Eq. 13; Madigan *v.* Mead (1883) 31 Minn. 94; Garber *v.* Henry (Pa. 1837) 6 Watts 57; Brinkerhoff *v.* Marvin (N. Y. 1821) 5 Johns. Ch. 520; Nicklin *v.* Betts Spring Co. (1884) 11 Or. 406; *cf.* Leeds *v.* Cameron (1839) 3 Sumn. 488.

[2]Wilson *v.* Russell (1859) 13 Md. 495; Louisville Banking Co. *v.* Leonard (1890) 90 Ky. 106. See also 10 COLUMBIA LAW REVIEW 483.

[3]Lawrence *v.* Tucker (1859) 23 How. 14; McCarty *v.* Chalfant (1878) 14 W. Va. 531; Jarratt *v.* McDaniel (1877) 32 Ark. 598.

[4]Lovelace *v.* Webb (1878) 62 Ala. 271; Crane *v.* Deming (1829) 7 Conn. 387; Brinkmeyer *v.* Browneller (1876) 55 Ind. 487; Tompkins *v.* Little Rock etc. Ry. (1882) 15 Fed. 6; Brinkmeyer *v.* Heilbling (1877) 57 Ind. 435; Hyman *v.* Hauff (1893) 138 N. Y. 48; but see Tapia *v.* Demartini (1888) 77 Cal. 383.

[5]See Todd *v.* Outlaw (1878) 79 N. C. 235.

[6]See Tapia *v.* Demartini *supra.*

advances if the value of the security is impaired by the imposition of another lien upon the property.[7]

In cases where the mortgagee is not under a duty to make advances, it is generally held that he should be postponed to intervening lienors, if he had notice of their rights when he made his loan.[8] This doctrine is clearly sound under either theory of mortgages, since even if a mortgage conveys the title, the mortgagee's equitable rights arise only when he makes his advances and hence the intermediate incumbrancer has a prior equity, while if it is a lien, it does not attach as such until the time of the loan. In most States, however, a record of the subsequent incumbrance is not regarded as constructive notice to the mortgagee, and actual notice to the latter is required in order to give priority to the intervening lienor.[9] This requirement is usually explained on the ground that a record is never notice to those whose rights are prior in time, and on the practical consideration that the opposite rule would impose the burden of vigilance on the wrong party.[10] Inasmuch, however, as the mortgagee's rights do not arise until the making of the loan, the first argument appears to be without foundation. Furthermore, while it can hardly be said to invariably inflict undue hardship on the mortgagee to require him to search the record whenever he makes an advance,[11] still it is arguable that the prevailing doctrine finds partial justification on equitable grounds.

On the other hand, where the mortgagee, being under no duty, makes his advances without knowledge of the intervening incumbrance, in a jurisdiction holding to the common law theory of a mortgage, he should be allowed to prevail.[12] In such case, the mortgagee, since he acquired the legal title in addition to his equitable rights, holds free from intervening liens. In States which regard a mortgage as a mere lien, since the lien arises only when the mortgagor becomes indebted to the mortgagee, the latter should in theory be postponed to subsequent incumbrancers even if he had no notice of their rights.[13] The doctrine of the common law jurisdictions, however, has been reached even here through the application of the fiction that the lien relates back to the date of the mortgage.[14]

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[7]West *v.* Williams L. R. [1899] 1 Ch. 132; see also Central Trust Co. *v.* Continental Iron Works (1893) 51 N. J. Eq. 605; but see Wilson *v.* Russell *supra.*

[8]Hopkinson *v.* Rolt (1861) 9 H. L. C. 514; Boswell *v.* Goodwin (1862) 31 Conn. 74; Griffin *v.* N. J. Oil Co. (1855) 11 N. J. Eq. 49; Ladue *v.* Detroit etc. R. R. Co. (1865) 13 Mich. 380; Union Nat. Bank *v.* Moline etc. Co. (1897) 7 N. D. 201; *contra* Witczinski *v.* Everman (1876) 51 Miss. 841.

[9]Ackerman *v.* Hunsicker (1881) 85 N. Y. 43; McDaniels *v.* Colvin (1844) 16 Vt. 300; Nelson's Heirs *v.* Boyce (Ky. 1832) 7 J. J. Marsh. 401; Schmidt *v.* Zahrndt (1897) 148 Ind. 447; *contra* Ladue *v.* Detroit etc. R. R. Co. *supra;* Spader *v.* Lawler (1848) 17 Oh. St. 461; Ter-Hoven *v.* Kerns (1846) 2 Pa. St. 96.

[10]Ackerman *v.* Hunsicker *supra.*

[11]Ter-Hoven v. Kerns *supra;* see Bank of Montgomery County's Appeal (1860) 36 Pa. St. 170.

[12]McDaniels *v.* Colvin *supra;* Schmidt *v.* Zahrndt *supra;* Central Trust Co. *v.* Continental Iron Works *supra;* but see Hughes *v.* Worley (Ky. 1808) 1 Bibb 200.

[13]*Cf.* Ladue *v.* Detroit etc. R. R. Co. *supra.*

[14]Ackerman *v.* Hunsicker *supra;* but see Hall *v.* Crouse (N. Y. 1878) 13 Hun 557.

This question was recently considered in *Re Sunflower State Refining Co.* (D. C., D. Kan. 1911) 183 Fed. 834. The case was governed by the law of Kansas, which adheres to the lien theory.[15] A corporation had executed a mortgage to trustees to secure bonds that might be issued in the future, and thereafter an attachment was levied on its property. Later, the bonds were issued to purchasers in good faith. The court adopted the doctrine that the recording of the attachment did not constitute notice to the purchasers of the bonds, and held that they should have a lien prior to that of the attaching creditor. The latter conclusion, although inconsistent with the lien theory of a mortgage, follows the principle usually adopted in cases where the mortgagee made his advances without notice.[16] It was strengthened, moreover, by the fact that as the case involved a corporate mortgage, the opposite result would be contrary to public policy, since the bonds would not be marketable unless the lien of the bondholders was allowed priority from the date of the mortgage.[17]

THE APPLICATION OF THE STATUTE OF FRAUDS TO PARTNERSHIP AGREEMENTS FOR SPECULATION IN LAND.—In its application to the law of partnership, that section of the Statute of Frauds which provides that no transfer or declaration of an interest in land, except such as are created by operation of law, shall be valid unless evidenced by writing, assumes perhaps its most important aspect in connection with attempts to establish a firm's interest in realty. It is practically undisputed that if the agreement to form the partnership is in writing, oral evidence may be introduced to show that land in fact belongs to the firm although the legal title is held by one of the partners.[1] In such a case a trust is implied either from the purchase of the land with funds belonging to the association[2] or from the fact that one partner has fraudulently taken title for his own benefit, when he should have acquired it for the firm.[3] Even though the contract of partnership is not in writing, yet if it can be construed to relate merely to the profits arising from the sale of real estate, oral evidence is permitted to show the share of each partner in such profits,[4] as the agreement is not treated as contemplating the acquisition of any interest in realty by the firm,[5] but the sale of the property is considered merely as a condition precedent to any right in the profits.[6] If on the other hand, one of the future partners promises to contribute land to the firm's

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[15]Pomeroy, Eq. Jur § 1188.

[16]See cases cited in notes 12 and 14.

[17]Central Trust Co. *v.* Continental Iron Works *supra;* see Reed's Appeal (1888) 122 Pa. St. 565; Tompkins *v.* Little Rock etc. Ry. *supra.*

[1]McKinnon *v.* McKinnon (1893) 56 Fed. 409; Fall River Whaling Co. *v.* Gordon (Mass. 1852) 10 Cush. 458.

[2]King *v.* Hamilton (1854) 16 Ill. 190; Cottle *et ux. v.* Harrold, Johnson Co. (1884) 78 Ga. 830; see Sherwood *v.* St. Paul, etc., R. R. (1875) 21 Minn. 127.

[3]Lacy *v.* Hall (1860) 37 Pa. St. 360; Jennings *v.* Rickard (1887) 10 Colo. 395.

[4]Coward *v.* Clanton (1889) 79 Cal. 23; Everhart's Appeal (1884) 106 Pa. St. 349; Davis *v.* Gerber (1888) 69 Mich. 246.

[5]See cases under previous note.

[6]Davis *v.* Gerber *supra.*